Mandarin Pavilion Sdn Bhd v Chang Vui Lun & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(A)-705–04 OF 2017
DAVID WONG, ABANG ISKANDAR AND YEOH WEE SIAM JJCA
3 OCTOBER 2018

Revenue Law — Goods and Services Tax ('GST') — Liability — Parties entered into contract before enforcement of Goods and Service Tax Act 2014 — Whether goods and services tax payable by respondents in agreement entered between appellant and the respondents prior to introduction of GST

The appellant was the developer of a project consisting of 53 units of two storey and three storey shop office. The respondents pursuant to a sale and purchase agreement ('the SPA') jointly purchased one unit of three storey shop office lot from the appellant. At the time when the parties entered into the SPA on 1 April 2014, there was no Goods and Service Tax Act 2014 ('the Act'), which only came into force on 1 April 2015. The appellant was a Government Service Tax ('GST') registered company under the Act. It was the position of the appellant that with the introduction of the GST legislation, all progressive claims after the 1 April 2015 would be subject to GST and payable by the respondents. Premised on that stand, the appellant issued letters of progressive claims which included GST on 21 January 2016 and 10 May 2016 requesting the respondents to settle the same. The High Court held that no GST was payable by the respondents premised on the learned judge's construction of cl 25 of the agreement between the parties, resulting in this appeal. The issue for consideration was whether the GST was payable by the respondents in the context of an agreement entered between the appellant and the respondents prior to the introduction of the GST.

Held, dismissing the appeal with costs of RM10,000:

(1) When cl 25 was drafted, neither party would have envisaged the implementation of the Act. In any event, a correct construction of cl 25 would be that any new costs, fees or tax must refer only to the development of the estate. GST as alluded to earlier was non-existent when the sale and purchase agreements were entered into and to impute those costs, fees or tax introduced by new laws to include GST would run contrary to the plain meaning to the words employed in cl 25. GST payments could not in any way affect the 'developmentof the estate' (see para 15).

(2) The Act was a law of general application imposed on supplier of goods and services as can be seen from s 9(3) of the Act. Hence, the appellant

was liable to pay the GST chargeable. However, s 9(3) of the Act did not provide for the supplier to claim reimbursement the GST paid from the respondent. For tax legislation any imposition of tax on anybody must be expressly provided for. There was no equity in tax jurisprudence. In respect of the SPA, there appeared to be no express provision for the appellant to claim reimbursement of the GST paid from the respondent. The appellant had no contractual or statutory right to recover any GST liability from the respondent. Even if there was any ambiguity in cl 25 of the SPA it did not help the appellant as the contra preferentum rule applied as it was not disputed that the sales and purchase agreement was prepared by the appellant (see paras 16–18).

[Bahasa Malaysia summary

Perayu adalah pemaju projek yang terdiri daripada 53 unit kedai dua tingkat dan kedai tiga tingkat. Responden menurut perjanjian jual beli ('SPA') bersama membeli satu unit kedai pejabat tiga tingkat daripada perayu. Pada masa pihak-pihak memasuki SPA pada 1 April 2014, tiada Akta Cukai Barang dan Perkhidmatan 2014 ('Akta'), yang hanya berkuat kuasa pada 1 April 2015. Perayu adalah syarikat berdaftar Cukai Perkhidmatan Kerajaan ('GST') di bawah Akta. Adalah kedudukan perayu bahawa dengan pengenalan undang-undang GST, semua tuntutan progresif selepas 1 April 2015 akan tertakluk kepada GST dan perlu dibayar oleh responden. Berasaskan dengan pendirian tersebut, perayu mengeluarkan surat tuntutan progresif yang termasuk GST pada 21 Januari 2016 dan 10 Mei 2016 yang meminta responden untuk menyelesaikannya. Mahkamah Tinggi berpendapat bahawa tiada GST yang perlu dibayar oleh responden berdasarkan pada interpretasi hakim yang bijaksana dari klausa 25 perjanjian antara pihak-pihak yang mengakibatkan rayuan ini. Isu untuk pertimbangan ialah sama ada GST perlu dibayar oleh responden dalam konteks perjanjian yang dibuat antara perayu dan responden sebelum pengenalan GST.

Diputuskan, menolak rayuan dengan kos RM10,000:

(1) Apabila klausa 25 dirangka, tiada pihak yang akan membayangkan pelaksanaan Akta tersebut. Dalam apa jua keadaan, interpretasi klausa 25 yang betul adalah bahawa apa-apa kos, yuran atau cukai baru mesti merujuk hanya kepada pembangunan hartanah. GST seperti yang digariskan sebelum ini adalah tidak wujud apabila perjanjian jual beli telah dimasukkan dan untuk menyangkal kos, yuran atau cukai yang diperkenalkan oleh undang-undang baru untuk memasukkan GST akan bertentangan dengan makna jelas kepada perkataan yang digunakan dalam klausa 25. Pembayaran GST tidak dapat dengan apa-apa cara mempengaruhi 'pembangunan hartanah' (lihat perenggan 15).

(2) Akta tersebut adalah undang-undang penggunaan umum yang dikenakan ke atas pembekal barangan dan perkhidmatan sebagaimana

yang dapat dilihat dari s 9(3) Akta. Oleh itu, perayu bertanggungjawab untuk membayar GST yang dikenakan. Walau bagaimanapun, s 9(3) Akta tidak menyatakan untuk pembekal untuk menuntut pembayaran balik GST yang dibayar daripada responden. Untuk undang-undang cukai apa-apa pengenaan cukai ke atas sesiapa sahaja mesti diperuntukkan secara nyata. Tiada ekuiti dalam perundangan cukai. Berhubung dengan SPA, tiada peruntukan nyata bagi perayu untuk menuntut pembayaran balik GST yang dibayar daripada responden. Perayu tidak mempunyai hak kontrak atau undang-undang untuk mendapatkan kembali sebarang liabiliti GST daripada responden. Sekalipun terdapat kekaburan dalam klausa 25 SPA, ia tidak membantu perayu kerana peraturan contra preferentum terpakai kerana ia tidak dipertikaikan bahawa perjanjian jual beli telah disediakan oleh perayu (lihat perenggan 16–18).]

Notes

For cases on goods and services tax ('GST') in general, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2555–2564.

Cases referred to

Mah Ong Kee and another v Kaiyo Reptile Products Pte Ltd [2011] SGHC 188, HC (refd)

Q Sentral Retail Lot 11-2 Sdn Bhd v Cosy Bonanza Sdn Bhd [2016] MLJU 1473, HC (refd)

Legislation referred to

Goods and Service Tax Act 2014 s 9(3)
Goods and Service Tax Act [SG] s 8(3)

Appeal from: Originating Summons No BKI-24–80/8 of 2016 (High Court, Kota Kinabalu)

Lim Pitt Kong (PK Lim & Co) for the appellant.
Ryan Soo (Roland Cheng & Co) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal related to the sole issue of whether the government service tax (GST) is payable by the respondents/plaintiffs in the context of an agreement entered between the appellant/defendant and the respondents prior to the introduction of the Goods and Service Tax Act 2014 ('the GST Act').

[2] The High Court held that no GST was payable by the respondents

premised on the learned judge's construction of cl 25 of the agreement between the parties, resulting in this appeal.

[3] We heard the appeal and dismissed the same. We now give our reasons for our decision.

BACKGROUND FACTS

[4] The appellant is the developer of a project known as the 'Austin Business Park Mogonibung' consisting of 53 units of two storey and three storey shop office.

[5] The respondents pursuant to a sale and purchase agreement dated 1 April 2014 ('SPA') jointly purchased one unit of three storey shop office lot known as Lot 52, Block F, Austin Business Park Mogonibung ('the property') from the appellant subject to the terms and conditions therein contained for a purchase price of RM1,349,000 which sum is to be paid by way of progressive payments premised on works completed.

[6] At the time when the parties entered into the SPA on 1 April 2014, there was no GST Act, which Act only came into force on 1 April 2015.

[7] The appellant is a GST registered company under the GST Act.

THE APPELLANT'S POSITION

[8] It is the position of the appellant that with the introduction of the GST legislation, all progressive claims after the 1 April 2015 would be subject to GST and payable by the respondents. Premised on that stand, the appellant issued letters of progressive claims which included GST on 21 January 2016 and 10 May 2016 requesting the respondents to settle the same.

THE RESPONDENT'S POSITION

[9] The position taken by the respondents is simply this: as there is no provision in the SPA providing for the payment of the GST by the respondent, the appellant cannot pass and request for payment of the same from the respondents.

HIGH COURT DISPUTE

[10] The learned judge in the High Court premised his decision to fix liability on the appellant to pay the payable GST amount on cl 25 of the SPA, which states that the appellant is liable to pay any new fees, charges or

A impositions and applied the case of *Q Sentral Retail Lot 11-2 Sdn Bhd v Cosy Bonanza Sdn Bhd* [2016] MLJU 1473.

OUR GROUNDS OF DECISION

B **[11]** It was our view that this appeal can be dealt with by construing cl 25 of the SPA, which reads as follows:

> In the event of the introduction of any new laws, by-laws, rules or regulation which shall be imposed on the Developer, the Developer shall be liable to pay any new or additional fees or charges or impositions.

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[12] The appellant had submitted that the learned judge had erred in relying on cl 25 of the SPA to conclude that the appellant is liable for the payment of the payable GST amount. The offending paragraph of the grounds of the D learned judge is this:

> In my mind, with the implementation of GST, the cost to develop the estate would increased with the GST and it is in this manner that the development of the estate is affected

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[13] It was the contention of learned counsel for the appelent that cl 25 relates solely to the costs of the development of the commercial housing estate. This was how learned counsel put it:

F > The learned Judge erred in his finding that with the implementation of GST (See: ROA (1), page 12, lines 3 to 6), the cost to develop the Estate would increase to include the GST because he failed to consider and also fail to understand that:
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> (a) on the issue of this case, that is, GST chargeable on the Property sold by the Appellant (Developer) to the Respondents (Purchasers), the Appellant (Developer) is in the position of a supplier of a taxable supply while his finding on which the decision was based on (that is, 'with the implementation of GST, the cost to develop the Estate would increase to include the GST'), the Appellant (Developer) is in the position of a recipient of taxable supplies, for example, cement, steel, electrical wiring, pipes etc;
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> H (b) GST chargeable on the Property to which the Appellant (Developer) is the supplier is an output tax to the Appellant (Developer) while GST on the construction materials (ie construction materials are 'cost to develop the Estate') is an input tax to the Appellant (Developer). This distinction between output tax and input tax is crucial;
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> I (c) a registered person (Developer) is required to charge GST (output tax) on his taxable supply of goods (the Property) made to his customers (Purchasers). He (Developer) is allowed to claim back any GST incurred on his purchases (construction materials) (ie input tax) which are inputs to his business. Therefore, the tax (GST) itself is not a cost to the

intermediaries and does not appear as an expense item in their financial statements and therefore the 'cost to develop the Estate' would not increase to include the GST as erroneously found by the learned High Court Judge (See: ROA (1), page 12, line 3 to 6). IT IS SUBMITTED THAT if GST on cement, steel, electrical wiring, pipes etc, being the construction materials for the Estate are not a cost and do not appear as an expense item in the financial statements, then certainly GST on the Property (ie the Property, not something used to develop the Estate) does not increase the cost to develop the Estate; and

(d) GST is a 'consumer' tax, and to be collected by the Appellant Developer as a 'registered person' under the GST Act for supplying the goods, that is, the Property purchased by the Respondents for payment to the Royal Malaysian Customs;

(e) the Guide on Property Developer Draft as at 11.03.2014 (See: IA (P) @ Tab 1) unequivocally states (quoted verbatim):

Goods and Services Tax (GST) is a multi-stage tax on domestic consumption (Emphasis underlined)

(f) clearly and unarguably, IT IS SUBMITTED THAT without any doubt, the GST is a consumption tax and NOT a development tax or a tax on the development of the Project under the SPA. Nor does it increase the cost to develop the Estate contrary to the finding by the learned High Court Judge (See: ROA (1), page 12, lines 3 to 6);

[14] Premised on the above, learned counsel submitted that the learned judge ought to have concluded that cl 25 of the SPA is not relevant or applicable in determining the issue of GST chargeable on the property as cl 25 refers to the introduction of any new laws, by-laws, rules or regulations 'affecting the development of the Estate under the SPA which shall be imposed on the Appellant as the Developer'.

[15] We found merit in the submission of learned counsel as when cl 25 was drafted, neither party would have envisaged the implementation of the GST Act. In any event, a correct construction of cl 25 would be that any new costs, fees or tax must refer only to the development of the estate. GST as alluded to earlier was non-existent when the sale and purchase agreements were entered into and to impute those costs, fees or tax introduced by new laws to include GST would run contrary to the plain meaning to the words employed in cl 25. GST payments cannot in any way affect the 'development of the Estate'.

[16] Be that as it may, we did not find in favor of the appellant and our reasons were these. GST Act is a law of general application imposed on supplier of goods and services as can be seen from s 9(3) of the GST Act. In the context of this case, the appellant is liable to pay the GST chargeable. We noted too that s 9(3) does not provide for the supplier to claim reimbursement the GST paid

from the consumer/respondent. In that regard we departed from the decision of the Singapore case of *Mah Ong Kee and another v Kaiyo Reptile Products Pte Ltd* [2011] SGHC 188 which says that there is nothing to preclude the supplier from recovering the GST from the consumer. We found such finding unsupported by the express words of s 8(3) of the Singapore GST Act which is similar to our s 9(3).

[17] We found that for tax legislation any imposition of tax on anybody must be expressly provided for. There is no equity in tax jurisprudence. In respect of the SPA, there appeared to be no express provision for the appellant to claim reimbursement of the GST paid from the respondent.

Conclusion:

[18] It is our view that having applied the trite law of construction of statute, it is quite clear that the appellant had no contractual or statutory right to recover any GST liability from the respondent. Even if there is any ambiguity in cl 25 of the SPA it did not help the appellant as the contra preferentum rule applied as it is not disputed that the sales and purchase agreement was prepared by the appellant. The contra preferentum rule requires the court to construe any ambiguity in the contract document against the party which drafts the ambiguous document.

[19] We dismissed the appeal with costs of RM10,000 subject to payment of allocator. Deposit to be refunded.

Appeal dismissed with costs of RM10,000.

Reported by Ahmad Ismail Illman Mohd Razali